87-1189

Supreme Court, U.S.
FILED
JAN 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DOYLE A. MAYS,

Petitioner,

VS.

REYNOLDS METALS COMPANY,
A CORPORATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an action for malicious defamation by an employee, working under the terms of a collective bargaining agreement, against his employer is preempted under § 301 of the Labor Management Relations Act, 29 USC §185, when the employer published defamation with knowledge of its falsity or with reckless disregard of whether it was true or false.

2. Did the Supreme Court of Alabama err in finding that, under the facts of this case, an action for malicious defamation by an employee, working under the terms of a collective bargaining agreement, against his employer was so intertwined with the terms of the collective bargaining agreement as to be preempted by § 301 of the Labor Management Relations Act, 29 USC § 185?

3. Whether a failure to raise the issue of federal labor law preemption under § 301 of the Labor Management Relations Act, 29 USC §185, on the trial level constitutes a waiver of such defense on the appeal level.

LIST OF PARTIES

Pursuant to Rule 21.1 (b) Petitioner certifies the following is a complete list of all parties:

(1) Doyle A. Mays, Petitioner

(2) Reynolds Metals Company, a Corporation, Respondent

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari be issued to review the decisions of The Supreme Court of Alabama entered in this case on August 21, 1987, and on October 23, 1987.

OPINIONS BELOW

This petition seeks review of a decision of The Supreme Court of Alabama, not yet reported. Subject decision and

the Court's denial of Petitioner's Motion for Rehearing appears in Appendix A, Infra (App.1) and Appendix B (App.8) respectively. The Petitioner's Complaint, Appendix C (App.9), Petitioner's Amended Complaint, Appendix D, (App.13), the Answer of Respondent, Appendix E, (App. 19), the Jury Verdict and the judgment entered by the trial court appears in Appendices F and G, infra (App.20-21) respectively.

JURISDICTION

The decision of The Supreme Court of Alabama was entered on August 21, 1987, and Motion for Rehearing denied on October 23, 1987. Jurisdiction of this Court is invoked under 28 USC §1257 (3).

STATUTE INVOLVED

Section 301 of the Labor Management Relations Act (61 Stat. 156, 29 USC §185) provides in pertinent part as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees between any such labor organizations, may be brought in the District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Alabama Supreme Court held that § 301 of the Labor Management Relations Act, 29 USC §185 (a) preempts a state court action brought by a union employee against his employer alleging malicious defamation even though no pleading filed by the petitioner (plaintiff below) referred to the collective bargaining

agreement or alleged a provision of the agreement had been violated and the collective bargaining agreement was not introduced in evidence at the trial of the case by either the petitioner or the respondent (defendant below).

Pursuant to Rule 21.1 (h), of the Rules of the Supreme Court of the United States, petitioner shows and alleges that the federal questions sought to be reviewed were not raised by the respondent in the court of first instance. The federal questions sought to be reviewed were first raised by the respondent in its brief to The Supreme Court of Alabama. In Issue No. 7 raised by the respondent in its brief to the Alabama Supreme Court, the respondent alleged that the state court lacked subject matter jurisdiction because the plaintiff's state tort claim was preempted under §301 of the Labor

Management Relations Act. The Alabama Supreme Court held that Mays' state tort claim was preempted by § 301 of said act.

A. THE FACTS

Doyle A. Mays was a union employee of Reynolds Metals Company on March 13, 1984, when a fire occurred in the office of the general foreman on the plant premises. Mays was suspected of arson and two days after the fire occurred, Reynolds notified Mays by phone that he had been suspended from employment for the purpose of continued investigation in relation to arson and sent him the following telegram (TR309, Plaintiff's Exhibit 18) through the Western Union system:

> Confirming our conversation Friday evening, effective March 16, 1984, you are suspended for the purpose of continued investigation regarding arson occurring at the plant on

the graveyard shift March 14, 1984. You are scheduled for a polygraph test Tuesday, March 20, 1984, at 11:30 a.m. at TTC Security, 3122 Jackson Highway, Sheffield, Alabama.

On March 21, 1984, Reynolds converted Mays' suspension into discharge and sent him the following telegram (TR311, Plaintiff's Exhibit 21) through the Western Union system:

> Your suspension of March 15, 1984, for the purpose of continued investigation regarding arson occurring at the plant has been converted to discharge effective March 16, 1984.

Although the collective bargaining agreement under which Mays worked for Reynolds was not introduced in evidence at the trial, the said agreement contained the following language with respect to termination or layoff:

> ARTICLE XVIII
> TERMINATION OR LAYOFF
>
> The Company has the right to discharge or lay off any employee for sufficient and reasonable cause, including, without being

> limited to, insubordination, inefficiency, or failure to comply with reasonable posted general plant rules. Such employee, and a representative of the Union, shall upon request be advised promptly in writing by the Company of the reason or reasons for such discharge or layoff. The employee shall have the right to appeal in accordance with the grievance procedure in Article XIX.
>
> Should it be found upon investigation as provided in Article XIX that an employee has been unjustly discharged or laid off, such employee shall be immediately reinstated in his former position, with full rights restored, and shall be compensated for all time lost less any amounts he received from other sources or such other disposition as may be determined.

As previously stated Mays was first suspended and then terminated from his employment. Without a request from Mays, Reynolds independently sent both of the above described telegrams (TR622, 876, 1064 and 1073).

William Vance, Western Union agent in Mays' hometown testified at the trial of the case that he received both

telegrams in his office through the Western Union telex machine. Mr. Vance testified that he took the telegram off the telex machine, noticed it being about arson and delivered the telegrams to Mays (TR1180-1224). At the trial a number of witnesses testified as to having heard of the allegation of arson being made against Mays and as to how Mays' reputation had been damaged. Mays and other witnesses testified as to the anguish and emotional distress Mays suffered as a result of the allegations. On May 25, 1984, Mays filed a malicious defamation action against Reynolds (TR3-5) (App.9-12) and filed an amended complaint on March 13, 1985, (TR55-57) (App.13-18).

Reynolds answered the complaint but no pleading, motion or any other document filed by Reynolds on the trial court level raised the issue of federal

labor law preemption. (App.19)

With respect to proof of malice, at trial Mays had evidence that, prior to accusing Mays of arson, Reynolds made an inadequate investigation. In initial interviews with Mays and fellow employees, tape recorded by Reynolds within a few hours of the fire, Mays accounted for his whereabouts at the critical time before the fire and named three fellow employees that could verify his whereabouts. Two of the three employees named by Mays were not even questioned by Reynolds as to Mays' whereabouts. The one employee that was questioned about Mays' whereabouts verified it (TR891-93; 925-27; 914-18; 918-20). At trial all three of these witnesses verified Mays' whereabouts at the critical time before the fire (TR367-69; 395-403; 403-415). Reynolds admitted that it had doubt as to Mays'

guilt at the time it sent the first telegram (TR-1021). No criminal charges were made against Mays even though the case was discussed by Reynolds with the police and the district attorney (TR-644 and 674). There was no evidence linking Mays with another employee who was seen walking out of a door in the direction of where the fire occurred shortly before the fire (TR588) and was seen in the immediate vicinity of the fire only about five (5) minutes before the fire was discovered (TR1098-99) and was seen after the fire by the general foreman with dust on his clothes which the foreman believes was dust from a narrow space in the immediate vicinity of the fire (TR863).

At the request of Reynolds, Mays took a polygraph examination and, in the opinion of the polygraph operator, gave a truthful answer in answering "no" to

the question, "Did you set the fire in Phil Tays office?" (TR1350). Based upon the results of the polygraph test Reynolds Metals sent Mays the second telegram without knowledge of how accurate or inaccurate polygraphs are but with knowledge that polygraphs are not 100% accurate (Plaintiff's Exhibit 21; TR121, 311, 622, 876, 1073, 1081). A letter was written by Mays to Reynolds demanding a retraction. No retraction was made (TR314,315,158).

At the trial witnesses testified that the accusation by Reynolds against Mays had affected Mays mentally, physically, socially and financially; that he is depressed and that, while his reputation had been good, it was now irreparably damaged (TR217-218, 518-522, 523-524, 527-529). One particular witness testified that he had read of the accusation of arson placed against

Mays in the newspaper; that he was familiar with Mays' general reputation in his home community previous to the accusation and it was good. Since the charge of arson had been made, Mays' reputation had been damaged (TR523-524).

At the conclusion of the presentation of the evidence the judge instructed the jury, in part, as follows:

> Now, ladies and gentlemen of the jury, the Court will instruct you on the law of damages. If you are reasonably satisfied from the evidence that the defendants, or one of them, libeled or slandered the plaintiff as claimed in the action, before you are authorized to award any damages, the plaintiff would have to prove to your reasonable satisfaction from the evidence that he suffered actual damage as a result of the alleged libel or slander. If you are reasonably satisfied from the evidence that the plaintiff suffered damage as a result of said libel or slander, then the plaintiff would be entitled to recover such sum as would reasonably compensate the plaintiff for such damage. In addition thereto, if you are further reasonably satisfied from the evidence that the libel was published maliciously

> or that the slander was communicated maliciously, that is, either with knowledge that it was false or with reckless disregard of whether it was false or not, then in such event, in addition to compensatory damages you may award punitive damages (TR1934).

Trial began on April 2, 1985. Because of several juror-related continuances, the trial did not conclude until April 26, 1985, when the jury returned a verdict against Reynolds assessing $150,000 in compensatory damages and $500,000 in punitive damages (R.230, TR1958-1959), (App.20). The Court then rendered judgment in accordance with the jury verdict (R.230, TR1960) (App.21-22).[1]

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[1]Although not reflected in the record Mays filed a grievance against Reynolds claiming that his termination was wrongful. On July 9, 10 & 11, 1985, subsequent to the defamation trial, arbitration was heard before F. Jay Taylor, impartial arbitrator selected by the parties through the administrative

services of the Federal Mediation and Conciliation Service, Washington, D. C. The discharge of Mays was vacated and Reynolds was directed to restore Mays to his former job with full backpay and allowances, less appropriate offsetting earnings including unemployment compensation. Seniority rights remained unimpaired.

B. THE ALABAMA SUPREME COURT DECISION

On August 21, 1987, The Supreme Court of Alabama held that Mays' defamation action was preempted by § 301 of the Labor Management Relations Act and voided the judgment of the trial court. To the issue of Reynolds having raised the preemption question for the first time on appeal, the Alabama Supreme Court held that Federal Labor Law preemption is not a waivable affirmative defense but is a challenge to the Courts' power to adjudicate the case, applying the reasoning set forth by this Court in International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S.____, 106 S. Ct. 1904, 90 L.Ed 2d 389 (1986).

C. FINALITY OF DECISION

The Alabama Supreme Court's decision, followed by its overruling of Mays' application for rehearing finally disposes of this case.

REASONS FOR GRANTING THE WRIT

A. The Supreme Court of Alabama has decided important questions of federal law which have not been, but should be, settled by this court.

It is well settled that federal labor law under the National Labor Relations Act, 49 Stat. 449, 29 USC § 151 et seq. does not preempt a state court action for a "particularly abusive manner" type tort. This is discussed at length in Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 97 S. Ct. 1056, 51 L. Ed. 2d 388 (1977). The Farmer exception to preemption is, in

substance, that even if regulated by the collective bargaining agreement, if a party acts in a "particularly abusive manner", such conduct is not preempted by the NLRA. Linn v. United Plant Guard Workers, 383 U.S. 63, 80, 86 S. Ct. 657, 15 L. Ed. 2d 582 classified malicious defamation as being one of the "particularly abusive manner" type torts so that an action for malicious defamation is not preempted under the NLRA. The United States Supreme Court said, in the Linn case:

> But it must be emphasized that malicious libel enjoys no constitutional protection in any context...the malicious utterance of defamatory statements in any form cannot be condoned...

In denying preemption under the NLRA for malicious defamation, this Court adopted the standards enunciated in New York Times Company v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed.

2d 686 (1964), with respect to defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false (exactly as the trial judge charged the jury in Mays v. Reynolds). In footnote number 7 the Linn case points out that an amicus curiae brief, filed by the U. S. government, urged the Court to limit liability to "grave" defamations such as those which accuse the defamed person of having engaged in criminal activity. This Court pointed out that such a holding would encroach too heavily upon state jurisdiction.

While Petitioner totally and emphatically disagrees with the decision of the Alabama Supreme Court in this case to the effect that the subject collective bargaining agreement is so intertwined with Mays' malicious

defamation claim as to be preempted by § 301 of the Labor Management Relations Act, 29 USC § 185, assuming for argument the correctness of said decision, the Mays' case now before the court, then squarely raises the issue of whether in passing the Labor Management Relations Act, the Congress of the United States intended to exempt a unionized employer from the common law consequences of its own malicious defamation. The answer can only be no!

It has long been the law of this land that it is contradictory to public policy for a party, be he employer, lessor, shop owner or anyone else, to exempt himself from liability for a malicious tort or from his own gross negligence or from his own wilful or wanton conduct by a provision of a contract and that such a contractual provision is void. Bisso v. Inland

Waterways Corporation, 349 U.S. 85, 75 S. Ct. 629, 99 L. Ed. _____; New York Central Railroad Company v. Mohney, 252 U.S. 152, 40 S. Ct. 287; Thomas v. Atlantic Coastline Railway, 201 F. 2d 167; Great Southern Railway v. Louisville and Nashville Railway Company (involving a train wreck that occurred in Alabama) 127 F. Supp. 363; Pruet v. Dugger-Holmes and Associates 162 S. 2d 613, 276 Ala. 403; James v. Naumann, 464 S. 2d 1260 (Florida Case); McCarthy Well Company v. St. Peter Creamery, 389 N.W. 2d 514 (Minnesota Case); Liberty Financial Management Corp. v. Benefield Data Processing Corp., 670 S.W. 2d 40 (Missouri Case); Tessler & Son, Inc. v. Sonitrol Sec. Systems, 497 A 2d, 530 (New Jersey); Williston On Contracts, § 1750 A.

Restatement, CONTRACTS 2d § 195 states as follows:

> A term exempting a party from tort liability for harm caused intentionally or recklessly as unenforceable on grounds of public policy. A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if (a) the terms exempts an employer from liability to an employee for injury in the course of his employment; (b) the terms exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty, or (c) the other party is similarly a member of a class protected against the class to which the first party belongs. A term exempting a seller of a product from his special tort liability for physical harm to a user or consumer is unenforceable on grounds of public policy unless the term is fairly bargained for and is consistent with the policy underlying that liability.

Alabama and some of the other states have even held that, with some exceptions, a contract exonerating a party from his own simple negligence is void as against public policy. Majors v. Kalo Laboratory, Inc., 407 F. Supp. 20, Great Southern Railway Company v.

Sumter Plywood, 359 S. 2d 1140.

If Congress intended, in passing the LMRA, to permit federal labor law preemption of a violent or malicious act, even if the same would otherwise have been intertwined within the terms of the collective bargaining agreement, then an employee can recover no damages for injuries maliciously or intentionally inflicted by an employer provided the same is intertwined within the terms of the collective bargaining agreement. As an example, if a collective bargaining agreement had within its terms a provision stating that an employer could inflict corporal punishment for, say going to sleep on the job, and that the employer would be exempt from civil common law liability for any injuries received by the employee from said punishment, the employee would not be permitted to

recover damages for any personal injuries he received. Petitioner submits that it was not the intent of Congress to override the long established public policy in this country when it adopted the LMRA.

In 1986, in the case of International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S.____, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986), this court held that a failure to raise federal labor law preemption under the National Labor Relations Act at the trial level did not constitute a waiver of such defense and that since state courts lacked subject matter jurisdiction to try NLRA cases, jurisdiction lying only in the National Labor Relations Board, the federal labor law preemption defense could be raised at any level, even on appeal. In the present case Reynolds Metals Company

contends that federal labor law preemption under § 301 of the LMRA is a defense that can be raised at any level, even on appeal. The distinction is, of course, that International Longshoremen's Ass'n AFL-CIO v. Davis, supra applied to the NLRA and not to the LMRA. As pointed out by this court in International Longshoremen's Ass'n AFL-CIO v. Davis, supra, the NLRA established the National Labor Relations Board vesting in it exclusive jurisdiction to adjudicate issues arising under the NLRA. The LMRA provides for no similar board or authority. Jurisdiction to adjudicate issues arising under the LMRA rests in either federal or state courts. The Alabama Circuit Court has jurisdiction to try defamation cases and, for that matter to try LMRA cases. While the case before the court was never treated

as an LMRA case by either Mays or Reynolds until Reynolds raised the issue on appeal, no objection or exception was made by Reynolds at the trial level with respect to damages being awarded for injuries which were not compensable under the LMRA. Since the Alabama trial court had jurisdiction to try both malicious defamation cases and LMRA cases, failure to raise this issue on the trial level constituted a waiver by Reynolds.

B. The Supreme Court of Alabama has decided a federal question in a way in conflict with the decisions of federal courts of appeal.

The decision of the Alabama Court is in direct conflict with the decision in Tellez v. Pacific Gas & Electric Co., 817 F. 2d 536, Cert. Denied 108 S. Ct.

251 and with Allis-Chalmers Corp. v. Lueck, 171 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206 and with International Brotherhood of Electrical Workers, AFL-CIO v. Hechler, ____U.S.____107 S. Ct. 216. The leading case regarding federal labor law preemption under § 301 of the LMRA is the Allis-Chalmers v. Lueck Case, supra. A brief summary of the Allis-Chalmers case is as follows:

The Collective Bargaining Agreement under which the Plaintiff worked for the Defendant incorporated within its terms a separately negotiated disability insurance plan and provided for arbitration in case of a contract dispute. The Plaintiff contended the Defendant exercised bad faith in the handling of his disability insurance claim and filed a tort action based on this alleged bad faith. In 105 S. Ct. at Page 914, this court discusses the

applicable state law with respect to bad faith claims and states that the tort of bad faith was nothing more than a way to plead a certain kind of contract violation. The decision describes the relationship between the collective bargaining agreement and the Plaintiff's bad faith action and goes on to say that the extent of both the duty to abide by the terms provided by the insurance plan and the duty to act in good faith ultimately depend upon the terms of the collective bargaining agreement, both being tightly bound with questions of contract interpretation. The Court said:

> Because the right asserted not only derives from contract, but is defined by the contractural obligation of good faith, any attempt to assess liability here inevitably will involve contract interpretation.

This Court in Allis-Chalmers, emphasizes over and over that only where

a tort claim is substantially dependent upon the interpretation of the terms of a collective bargaining agreement is it preempted by federal labor-contract law. As an example in Allis-Chalmers, as reported in 105 S. Ct., the Court says as follows:

> (Page 1916) - It is perhaps worth emphasizing the narrow focus of the conclusion we reached today.
>
> (Page 1916) - We do hold that when resolution of a State-Law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as preempted by federal labor-contract law.
>
> (Page 1910, footnote 4) - We cannot declare preempted all local regulation that touches or concerns in any way the complex relationships between employees, employers, and unions, obviously much of this is left to the States.
>
> (Page 1916) - Nor do we hold that every state-law suit asserting a right that relates in someway to a provision in a collective bargaining agreement, or more generally to the parties to such an agreement, necessarily is preempted

by § 301.

> (Page 1911) - Of course, not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is preempted by § 301...nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation.
>
> (Page 1912) - Clearly, § 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law. In extending the preemptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that prescribe conduct, or establish rights and obligations, independent of a labor contract.

Petitioner's tort claim for malicious defamation is not substantially dependent upon the interpretation of the terms of the collective bargaining agreement. The only term of the collective bargaining agreement which is even remotely connected with this case is the

provision regarding written notice to an employee for the reason for a layoff or termination to be given if a request is made therefor. In this case no such request was made. Reynolds took it upon itself to notify petitioner and others of its reasons. Reynolds Metals Company notified Mays by telephone on March 16, 1984, that he had been suspended on suspicion of arson and then on March 16, 1984, sent him written notice of the fact that he had been suspended on suspicion of arson by U. S. Mail (Plaintiff's Exhibit Number 16 TR308), then sent him a telegram on March 19, 1984, publishing to the Western Union employees the fact that Mays had been suspended on suspicion of arson (Plaintiff's Exhibit Number 18, TR309). Reynolds then sent Mays a letter by U. S. Mail dated March 21, 1984, notifying him that he had been terminated for

arson (Plaintiff's Exhibit Number 19, TR310) then sent him a telegram on March 21, 1984, again publishing to Western Union employees the fact that Mays had been terminated for arson (TR311). All of these notices giving the reason for his suspension and then termination were sent without request. What possible interpretation of the collective bargaining agreement is this common law malicious defamation dependent upon? The terms of the collective bargaining agreement are not involved in the publication of the malicious defamation by Reynolds Metals Company to persons outside the sphere of that company.

While the facts are different, the recently decided case of International Brotherhood of Electrical Workers, AFL-CIO v. Hechler, _____U.S._____, 107 S. Ct. 216 is not substantially different from Allis-Chalmers. In Hechler, the

Plaintiff was injured while performing a job beyond her ability and training. Plaintiff claimed that there was a duty implied from the terms of collective bargaining agreement under which she worked, for her union to see that she was provided with a safe place to work. The Hechler decision states:

> An employee state-tort action that necessarily rests on an interpretation of those terms is preempted by § 301.

In Hechler, this Court said that the Plaintiff's claim was dependent upon the terms of the collective bargaining agreement. Further, the Court said that there was no common law duty on the part of the union-defendant to provide her with a safe place to work, that such a common law duty rested with her employer and not her union, and that any duty to provide her with a safe place to work on the part of the union must be derived

from the terms of the collective bargaining agreement.

In the Hechler case the United States Supreme Court at least implies that had a common law duty existed on the part of the union, there would have been no federal preemption of the tort case. In Hechler the Defendant had no common law duty, the only duty involved in Hechler was whatever duty was placed upon the union by the agreement. In Mays v. Reynolds there is a common law duty not to defame. Mays' claim is based upon the common law tort of malicious defamation and there is absolutely no contract interpretation involved. In fact, the collective bargaining agreement was not even introduced into evidence at the trial by either side. The collective bargaining agreement has nothing whatsoever to do with Mays' claim, much less to be

substantially dependent upon the interpretation of its terms, as required by Allis-Chalmers and as required by Hechler.

The decision by the Alabama Supreme Court in this case is in direct conflict with Tellez v. Pacific Gas & Electric Co. (May, 1987) 817 F. 2d 536, Cert. Denied 108 S. Ct. 251. The Tellez case is strikingly similar to Mays and involves the publication to management personnel of a suspension letter sent to the employee charging the employee with purchasing drugs while on the job. The collective bargaining agreement involved did not require management to send written notice of suspension nor did it provide guidelines in the event such notice was sent. The Court held that the malicious defamation involved in Tellez did not assert rights deriving from the collective bargaining agreement

nor did it require interpretation of the agreement's terms. The Court held that California's defamation law established non-negotiable rights and obligations independent of any labor contract. Federal preemption under § 301 was denied as to the malicious defamation action.

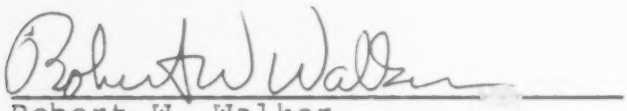
If a common law malicious defamation action by a union employee is preempted by federal labor law then a man or woman working under a collective bargaining agreement is without recourse for whatever damages he or she may have suffered to his or her reputation and character and for mental anguish and embarrassment while the employer escapes its common law imposed liability for compensatory and punitive damages. If the collective bargaining agreement involved had said, "The employer is exempt from liability for the malicious

defamation of an employee", such a provision would be void as against public policy. It is respectfully submitted that Congress had no intent to preempt malicious defamation when it adopted the federal labor law. The Alabama Supreme Court has misinterpreted the federal decisions.

CONCLUSION

For these reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that three copies of this Petition for Writ of Certiorari were served this 13th of January, 1988, by placing them in United States mail, first class postage prepaid, addressed to Respondent's counsel of record, Braxton W. Ashe and J. Michael Tanner, c/o Almon, McAlister, Ashe, Baccus & Tanner, P. O. Box 899, Tuscumbia, Alabama 35674 and to John H. Morrow and Walter J. Sears, III, c/o Bradley, Arant, Rose and White, 1400 Park Place Tower, Birmingham, Alabama 35203, in accordance with Rule 28.3 of the rules of this Court.

Robert W. Walker

Robert W. Walker

APPENDIX

APPENDIX A

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1987

Reynolds Metals Company, a Corporation
84-1317 v.

Doyle A. Mays

Appeal from Colbert Circuit Court

ALMON, JUSTICE.

This is a defamation case. The appellee, Doyle Mays, was employed by the appellant, Reynolds Metals Company, Inc., as a furnace operator in the cast house at its reclamation plant in Sheffield, Alabama. On May 14, 1984, during the 11:00 p.m. to 7:00 a.m. shift, a fire was intentionally set in the office of Phillip Tays, the general foreman of the cast house. Reynolds's investigation of the fire turned up

three suspects--Willie Gillis, Dub Givens and Mays. The three suspects were suspended pending further investigation and were subsequently notified by telegram through the Western Union system that they were to take a polygraph test. Gillis passed the test and was reinstated to his job. Givens and Mays failed and were notified by telegram through the Western Union system that they were discharged.

Mays filed suit in circuit court claiming that the telegrams were defamatory and that there had been a publication to the Western Union employees. Mays also claimed that Raymond Graham, an investigator with Reynolds's industrial security department, had made a defamatory statement to Gary Holcombe, another furnace operator at the Sheffield plant. Graham made the statement during an

interview with Holcombe when Graham said that he thought that Gillis, Givens, and Mays were involved in the fire.

At the trial of this action, a jury returned a verdict against Reynolds, assessing damages of $150,000 compensatory and $500,000 punitive. The court then rendered judgment in accordance with the jury verdict. Reynolds appeals from this judgment.

Reynolds claims that the state court lacks subject matter jurisdiction of this action, and that the judgment in favor of Mays is void, because Mays's state tort claim for defamation is preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Reynolds raises this issue for the first time on appeal. Mays argues that federal preemption is an affirmative defense that must be affirmatively pleaded in order to avoid

waiver. Mays cites as authority International Longshoremen's Ass'n, AFL-CIO v. Davis, 470 So. 2d 1215 (Ala. 1985). However, that case was appealed to the United States Supreme Court, which held a claim that state court proceedings are preempted by the provisions of the National Labor Relations Act, 29 U.S.C. § 151 et seq., is not a waivable affirmative defense but a challenge to the court's power to adjudicate the case so that such a claim must be addressed by the court whenever it is raised. International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S.___, 106 S. Ct. 1904, 90 L. Ed 2d 389 (1986).

Thus, the question is before us as to whether the LMRA preempts the present action. In Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985), the Court held

that a tort claim "inextricably intertwined with consideration of the terms of the labor contract" is preempted under § 301. Id., 471 U.S. at 213. The question, then, is whether Mays's claim is sufficiently independent of the collective bargaining agreement to withstand the preemptive force of Section 301. International Bhd. of Elec. Workers, AFL-CIO v. Hechler, ___ U.S. ___, 107 S. Ct. 216 (1987).

The alleged defamatory statement by Graham was made during the investigation of the arson, as to which Mays was a suspect. The first telegram was sent to Mays to notify him that he was suspended and the second to notify him that he was discharged. To hold a company liable for defamation in a situation such as this would "simply mean that the company could never undertake to investigate a possible

disciplinary situation in routine and proper ways." "Strachan v. Union Oil Co., 768 F 2d 703, 706 (5th Cir. 1985). Gillis v. Reynolds Metals Co., No. CV-84-HM-5319-NW (N.D. Ala. January 27, 1986),[1] arose from the same incident as the present case. In holding that the suit was preempted by Section 301, the court cited the above passage from Strachan. The decision was affirmed without a published opinion, by the Eleventh Circuit Court of Appeals. Gillis v. Reynolds Metals Co., 802 F. 2d 1398 (11th Cir. 1986), reh'g denied, 808 F. 2d 61 (11th Cir. 1986).

---

[1]The unpublished opinion of the district court was provided to this Court by Reynolds.

The defamation action is preempted by § 301 of the LMRA and the judgment of the circuit court is void. Because a void judgment will not support an appeal, the appeal is due to be dismissed. Graddick v. McPhillips, 448 So. 2d 333 (Ala. 1984); Underwood v. State, 439 So. 2d 125 (Ala. 1983).

APPEAL DISMISSED.

Maddox, Jones, Beatty, and Houston, JJ., Concur.

APPENDIX B

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 84-1317

REYNOLDS METALS COMPANY, a Corp.

Appellant

vs.

DOYLE A. MAYS

Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

XXXXX Application for rehearing overruled. No opinion written on rehearing. Per Curiam - Maddox, Jones, Almon, Beatty & Houston, JJ., concur.

10/23/87

Robert G. Esdale, Clerk
Supreme Court of Alabama

APPENDIX C

STATE OF ALABAMA * IN THE CIRCUIT COURT

COUNTY OF COLBERT * CASE NO. CV-84-209-J

DOYLE A. MAYS,

Plaintiff

vs.

REYNOLDS METALS COMPANY,
a corporation,
Muscle Shoals, Alabama

and

PHILLIP TAYS,
an individual
c/o Reynolds Metals Company
Muscle Shoals, Alabama,

Defendants

C O M P L A I N T
C O U N T I

1. Plaintiff claims of the Defendants $5,000,000.00 damages for falsely and maliciously charging the Plaintiff with a crime by speaking of and concerning him in the presence of diverse persons, in substance as follows:

2. That the Plaintiff committed arson in the setting of a fire at the office of Defendant Tays at the Reynolds Metals Alabama Reclamation Plant in Muscle Shoals, Alabama on the 14th day of March, 1984.

3. As a result of above said slander the Plaintiff was injured and damaged in that his character was defamed, he was embarrassed and humiliated, caused to suffer mental anquish and his character and reputation were defamed.

4. Plaintiff claims compensatory and punitive damages.

C O U N T II

5. Plaintiff claims of the Defendants $5,000.000.00 compensatory and punitive damages for falsely and maliciously publishing of and concerning him a notice of suspension and a notice of termination of employment, with

intent to defame the Plaintiff, claiming in effect that Plaintiff committed the crime of arson in the burning of the office of Defendant Tays at Reynolds Metals Alabama Reclamation Plant in Colbert County, Alabama on the 14th day of March, 1984.

6. As a result of said libel the Plaintiff was injured and damaged in that his character was defamed, he was embarrassed and humiliated, caused to suffer mental anquish and his character and reputation were defamed.

C O U N T III

7. Plaintiff claims of the Defendants $5,000,000.00 compensatory and punitive damages for falsely and maliciously slandering and/or libeling the Plaintiff by charging the Plaintiff with arson by the acts of suspending and terminating the Plaintiff from employment and other actions, which said

actions were made known to diverse persons, for the alleged crime of arson in the burning of the office of Mr. Tays at Reynolds Metals Alabama Reclamation Plant in Colbert County, Alabama on the 14th day of March, 1984.

Doyle A. Mays
1539 Helton Dr., Apt. B-4
Florence, AL 35630

Robert W. Walker
Attorney for Plaintiff
WALKER & MUSGROVE
226 West Alabama Street
Florence, Alabama 35630
Telephone: 764-1449

Plaintiff demands a trial by struck jury in this cause.

Robert W. Walker
Attorney for Plaintiff

APPENDIX D

STATE OF ALABAMA * IN THE CIRCUIT COURT

COLBERT COUNTY * CASE NO. CV 84-209-J

DOYLE A. MAYS,

Plaintiff

VS.

REYNOLDS METALS CO.,
et al,

Defendants

AMENDMENT

Comes now the Plaintiff and amends his complaint heretofore filed by adding to said complaint the following counts.

COUNT IV

1. The Defendants, separately and severally, falsely charged the Plaintiff with a crime by speaking of and concerning him in the presence of diverse persons in substance as follows:

2. That the Plaintiff committed arson in the setting of a fire at the office of Defendant, Phil Tays at

Reynolds Alabama Reclamation Plant, Muscle Shoals, Alabama, on the 14th day of March, 1984.

3. Plaintiff alleges that the Defendants knew that the above described defamatory statements were false or that the Defendants, separately and severally, acted in reckless disregard of the truthfulness or falsity of said defamatory statements or that the Defendants separately and severally negligently failed to ascertain for the said defamatory statements to be true or false.

4. As a result of the above said slander, the Plaintiff was injured and damaged in that his character was defamed, he was embarrassed and humiliated, was caused to suffer mental anquish, was caused to lose his job and to temporarily relocate to another location, Plaintiff incurred a loss of

income, travel expense, moving expense and other expenses.

WHEREFORE, Plaintiff demands judgment against the Defendants, in the sum of FIVE MILLION AND NO/100 ($5,000.000.00) DOLLARS.

COUNT V

1. Plaintiff claims that the Defendants, separately and severally, falsely published of and concerning the Plaintiff a written notice of suspension and a written notice of termination of employment based on the accusation that the Plaintiff committed arson and a setting of a fire at the office of defendant Phil Tays at the Reynolds Metals Alabama Reclamation Plant in Muscle Shoals, Alabama, on the 14th day of March, 1984.

2. Plaintiff avers that the above said libelous statements were made by the Defendants knowing that said

statements were false or in reckless disregard of those matters or that said Defendants negligently failed to ascertain in the truthfulness or falsity of said statements.

3. As a proximate result of the above said libel, Plaintiff was injured and damaged in that he was defamed, his character was damaged, he was embarrassed and humiliated and caused to suffer mental anguish, he was caused to lose his job and temporarily relocate to another city, Plaintiff suffered a loss of income, incurred travel expenses and moving expenses.

WHEREFORE, Plaintiff demands judgment against the Defendants, separately and severally, in the sum of FIVE MILLION AND NO/100 ($5,000,000.00) DOLLARS.

COUNT VI

1. Plaintiff claims that the Defendants separately and severally libeled or slandered the Plaintiff in falsely accusing the Plaintiff of arson in the setting of a fire at the office of Phil Tays at the Reynolds Metals Alabama Reclamation Plant in Muscle Shoals, Alabama, on the 14th day of March, 1984. Plaintiff alleges that said accusations were made with actual malice on the part of the Defendants.

2. As a proximate result of the above said slander or libel, the Plaintiff was injured and damaged in that he was defamed, embarrassed and humiliated. Plaintiff was caused to suffer mental anguish and his reputation was impaired. Plaintiff was caused to incur a loss of income and to lose his job. Plaintiff was caused to suffer and incur travel expenses and moving

expenses.

WHEREFORE, Plaintiff demands judgment against the Defendants, separately and severally in the sum of FIVE MILLION AND NO/100 ($5,000,000.00) DOLLARS for actual damages and punitive damages suffered.

WALKER & MUSGROVE

BY: Robert W. Walker
Attorney for Plaintiff

Plaintiff demands a trial by struck jury in this cause.

Robert W. Walker

APPENDIX E

IN THE CIRCUIT COURT OF
COLBERT COUNTY, ALABAMA

DOYLE A. MAYS
Plaintiff

vs. No. CV-84-209-J

REYNOLDS METALS COMPANY, et al.
Defendants

ANSWER OF DEFENDANTS

Come the defendants and for answer to the complaint heretofore filed in this case say as follows:

1. They are not guilty of the things and matters alleged in the complaint.

2. They deny the allegations of complaint.

3. The alleged defamatory statements in the complaint were not published.

Vincent McAlister
Attorney for Defendant

OF COUNSEL:
ALMON, McALISTER, ASHE, BASSUS & TANNER
P. O. Box 899
Tuscumbia, Alabama 35674
(205) 383-6357

EXHIBIT F

STATE OF ALABAMA * IN THE CIRCUIT COURT

COUNTY OF COLBERT * CASE NO. CV-84-209

JURY VERDICT

DOYLE MAYS

Plaintiff

VS.

REYNOLDS METALS COMPANY

Defendant

We, the jury, find for the Plaintiff and against the Defendant, Reynolds Metals Company, and fix compensatory damages in the sum of $150,000.00, and punitive damages in the further additional sum of $500,000.00.

Marshall D. Brooks
Foreman Signature

APPENDIX G

STATE OF ALABAMA * IN THE CIRCUIT COURT

COLBERT COUNTY * COLBERT COUNTY, AL

DOYLE MAYS, CASE NO. CV 84-209 J

Plaintiff

vs.

PHILLIP TAYS,

Defendant

O R D E R

In accordance with the two verdicts of the jury the Court does render judgment in favor of the Plaintiff, Doyle Mays, and against the Defendant, Reynolds Metals Company, in the amount of $150,000.00 compensatory damages, and in the sum of $500,000.00 punitive damages. Further, in accordance with the two verdicts of the jury the Court does render a judgment for the defendant, Phillip Tays.

Done and ORDERED at Tuscumbia, Alabama, this the 26th day of April, 1985.

Inge Johnson
Presiding Circuit Judge

cc: Robert W. Walker

Michael Tanner

Braxton Ashe

(2)

Supreme Court, U.S.
FILED
MAR 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1189

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DOYLE A. MAYS,
Petitioner

vs.

REYNOLDS METALS COMPANY,
a corporation,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION

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23pgs.

QUESTIONS PRESENTED FOR REVIEW

1. Was the lower court correct in finding, under the facts of the case, that Mays' state law claims were preempted by § 301?

2. Was the lower court correct in concluding that failure to raise § 301 preemption at the trial level did not serve as a waiver of § 301 preemption?

LIST OF PARTIES AND STATEMENT REQUIRED BY RULE 28.1

The parties are Doyle A. Mays, Petitioner, and Reynolds Metals Company, a corporation, Respondent. The following are the subsidiaries and affiliates of Respondent:

Subsidiaries

Alpart Farms (Jamaica), Ltd.
Alpart Jamaica Inc.
Alumina Partners of Jamaica
Aluminerie de Becancour Inc.
Aluminio del Caroni, S.A.
Aluminio Reynolds del Peru Sociedad Anonima
Aluminio Reynolds, S.A.
Aluminio Reynolds, Santo Domingo, S.A.
Aluminium Europe S.A., En Abrege: "Aleurope S.A."
Aluminium-Oxid-Gemeinschaft Stade
Aluminium Oxid Stade Gesellschaft mit beschrankter Haftung
Aluminum Corporation of the Philippines (dormant)
Arteaga, Sociedad Anonima, "Arteaga, S.A."
Asociacion Venezolana de Adiestramiento y Desarrollo del Aluminio (AVADAL)
Austria Dosen Gesellschaft mbH & Co. KG
Austria Dosen GmbH
Bevco Containers
Burrstone Associates
Compania Metalurgica Columbiana, S.A. "Comecol"
Egyptian Aluminium Products Company
Envases Valencianos, S.A.
Envases y Alimentacion Madrid, S.A.
Envases y Alimentacion, S.A.
Eskimo Europ, S.a.r.I.
Eskimo Pie Corporation

Eskimo Pie Corporation of Canada, Limited
Gerro Reynolds Dosenwerk GmbH & Co. KG
Halco (Mining) Inc.
Hamburger Aluminium-Werk Gesellschaft mit beschrankter Haftung
Industria Navarra del Aluminio, S.A.
Industrias Lacteas del Yocoima, S.A.
Industrias Metal-Mecanicas del Quindio S.A.
Jamaica Alumina Security Company, Ltd.
Lynx-Canada Explorations Limited
Manicouagan Power Company - La Compagnie Hydroelectrique Manicouagan
Mill Pond Development Corporation
Minas do Dragao Ltda.
Mineracao Rio do Norte S.A.
Mineracao Sao Jorge Ltda.
Mineradora de Bauxita Ltda.
Minerais de Aluminio Ltda.
Montaje de Plantas Montaplan, S.A. (inactive)
New Eastwick Corporation
Nuova Fonderpress S.p.A.
Omnia Minerios Ltda.
Pechiney Reynolds Quebec, Inc.
Phillips-C.B.A. Conductors Limited
Presidential Development Corporation
Presidential Manor Corporation
Presidential Plaza Corporation
Reynolds Aluninio, Sociedad Anonima
Reynolds Aluminium Deutschland Internationale Vertriebsgesellschaft mbH.
Reynolds Aluminium France
Reynolds Aluminium Holdinggesellschaft mgH
Reynolds Aluminum Company of Canada Ltd. - Societe d' Aluminium Reynolds (Canada) Limitee
Reynolds Australia Alumina, Ltd.
Reynolds Kansas City Can Company

Reynolds Metals Development Company
Reynolds Philippine Corporation
Reynolds Regency Corporation
Reynolds Seattle Can Company
Reywest Development Corporation
RMC Holdings (Delaware), Inc.
Ruedas de Aluminio C.A. "RUALCA"
Sherkat Sahami Iran Aluminium
(Iranian Aluminium Co.)
SLIM Cisterna S.p.A.
Superenvases Envalic C.A.
UMCO, S.A.
Union Industrial y Astilleros Barranquilla
"Unial" S.A.
Volta Aluminium Company Limited
Weybosset Hill Development Corporation

Affiliates

Alternative Housing Associates
Becancour Joint Venture
Bennett Manor Associates
Broward Lakes Business Park Joint Venture
Bushnell Plaza Development Corporation
Capitol Hill Associates, Ltd.
Cathedral Square Associates
Cathedral Square Associates II
Chasco Woods Associates, Ltd.
Crown Oak Associates of Penfield
Curtis Apartments Associates
Cypress Courts Associates, Ltd.
Cypress Cove Associates, Ltd.
Drew Gardens Associates, Ltd.
Eastwick Joint Venture I
Eastwick Joint Venture IV
Kimbrook Manor Associates

Lakeside Village Associates
Midtown Associates
Mill Pond Towers Associates
Mount Gibson Joint Venture
The National Housing Partnership
Oceanside Estates Associates, Ltd.
One Empire Plaza Associates
Rayburn Manor Associates
Regency Joint Venture
Regency West Associates
Reynolds Gilbane Realty Associates
The Reynolds-Gilbane-Weybosset Joint Venture
Reynolds Metals Company and Associate, L.P.
Reywest Development Company
Southeast Vinyl Company
Titusville Manor Associates
Windermere Associates, Ltd.
Worsley Alumina Pty. Ltd.
Worsley Alumina Trust
Worsley Joint Venture

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DOYLE A. MAYS,
Petitioner

vs.

REYNOLDS METALS COMPANY,
a corporation,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Reynolds Metals Company, respectfully requests the Court to deny the petition for writ of certiorari seeking review of the judgment of the Supreme Court of Alabama entered in this case on August 21, 1987, rehearing denied, October 23, 1987.

OPINION BELOW

The decision of the Supreme Court of Alabama is not yet reported, but is contained in Petitioner's Appendix.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTE INVOLVED

Section 301, Labor Management Relations Act, 29 U.S.C. § 185.

STATEMENT OF THE CASE

On March 14, 1984, on the graveyard shift, someone deliberately started a fire in the general foreman's office at the Reynolds Metals Company plant in Sheffield, Alabama. The arsonist(s) rigged a hose from a gasoline pump to feed this fire with running gasoline. Fortunately, the fire was spotted and extinguished before anyone was hurt. Respondent Reynolds Metals Company ("Reynolds") moved swiftly to investigate this serious threat to its employees and its property. Reynolds immediately sent Raymond Graham, an investigator from its industrial security office in Richmond, Virginia, to Alabama. After conducting his investigation, Mr. Graham reported to local plant management that there were three suspects, one of whom was petitioner Mays. (Tr. 600-05) In his Statement of the Facts, Mays cites evidence to show that he had an alibi. However, information gathered by Graham from other Reynolds employees called that alibi into serious question. (Tr. 566-85, 735-43, 1127-28, 1148-49, 1171-91, 1207-14) In the interest of plant safety, Reynolds decided to suspend the three suspects pending further investigation, including a polygraph examination. (Tr. 1059-60) The three men were notified of their suspension and the date and time to appear for the polygraph by telegram.

One of the three passed the polygraph and was immediately reinstated. Mays and the third employee failed the polygraph. As Mays points out in this Statement of Facts, the polygraph examiner concluded that Mays' "no" answer to the following question was not deceptive: "Did you set the fire in [the foreman's] office?" However, Mays does not add that the polygraph examiner concluded that Mays' "no"

answers to the following questions were deceptive: "Did you attach the rubber tubing to the gas pump nozzle?" "Do you know who set the fire in [the foreman's] office?" "Did you participate in putting gas in [the foreman's] office?" "Did you break the window in [the foreman's] office?" (Tr. 1347-48; R. 361) Mays and the other employee who failed the polygraph were terminated. They were notified of the termination by telegram.

The terms of Mays' employment with Reynolds were governed by a collective bargaining agreement (the "Agreement") between his union and Reynolds. Article XVIII of the Agreement grants to Reynolds "the right to discharge or lay off any employee for sufficient and reasonable cause ...." Article XIX of the Agreement establishes a grievance procedure to be followed in the event of a dispute arising under the Agreement, including a dispute over the termination or suspension of an employee. Article XX of the Agreement provides that any dispute between the parties to the Agreement not satisfactorily resolved by the grievance procedure shall go to binding arbitration. Shortly after his termination, Mays filed a grievance against Reynolds in connection with his termination. The grievance eventually went to binding arbitration after the trial in this case.

Mays filed this defamation action on May 25, 1984. At trial, the evidence against Reynolds consisted of (1) a statement by Mr. Graham, the Reynolds investigator, to another Reynolds employee, whom Graham was questioning in the course of his investigation, that, "he knew, you know, he thought Doyle [the petitioner] was involved in the fire" (Tr. 434) and (2) the communication to Western Union of the two telegrams to Mays which referred to

suspension, "for the purpose of continued investigation regarding arson occurring at the plant." (R. 309, 311)

The trial was held in April, 1985. There were factual disputes regarding Mays' alibi and the facts unearthed by the Graham investigation. There were also factual and legal disputes regarding the applicability and the scope of the Alabama common law of conditional privilege for defamatory statements, including the degree and type of malice required for liability.

The references in Mays' Statement of Facts to trial testimony regarding damages is not complete. That testimony only linked the damages complained of either to the firing of Mays or to a newspaper article with which Reynolds had no involvement. There was no testimony that the damages claimed by Mays were in any way related to the allegedly defamatory statement made by Mr. Graham to the Reynolds employee during his investigation or to the publication of the contents of the telegrams by Reynolds to Western Union. (Tr. 117-27, 217-19, 416-48, 498, 511-29)

The trial resulted in a jury verdict against Reynolds in the amount of $650,000. Reynolds appealed this verdict to the Alabama Supreme Court contending numerous errors in the jury instructions regarding the law of libel and slander and related issues of conditional privilege and malice. Reynolds also contended, for the first time, and based on *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), which was decided after the commencement of the trial in this case, that Mays' state law claim for defamation was preempted by § 301 of the Labor Management Relations Act.

In July, 1985, after the trial in this case, the binding arbitration under the collective bargaining agreement was held. The arbitrator ruled for Mays and reinstated him with back pay and full seniority rights.

In an opinion filed August 21, 1987, the Alabama Supreme Court ruled the § 301 preemption was not waivable and that Mays' claim was preempted by § 301.

REASONS FOR DENYING THE WRIT

I. The Court Should Deny Review of the Preemption Issue

The Court below correctly applied the standards set forth in *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), and its progeny to conclude, under the particular facts of the case, that Mays' state law claims were preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("§ 301"). On that basis, as well as the bases presented below, the Court should deny *certiorari*.

A. The Court Has Provided Sufficient Guidance on § 301 Preemption in *Allis-Chalmers v. Lueck*

Less than three years ago, the Court extensively addressed the extent to which § 301 preempts state law tort claims. *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985). In *Lueck*, the Court concluded that state law torts are preempted where "evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213. As discussed below, the lower courts have had no

difficulty in consistently applying that standard. There is no need for further guidance and, hence, no need for the court to grant *certiorari* to revisit this issue.

B. The Determination Of Whether A Particular State Law Tort Claim Is Preempted Under Section 301 Of The Labor Management Relations Act is Dependent On The Facts Of Each Case.

This court recognized in *Lueck* that the determination of whether a particular state law tort claim is preempted under § 301 is dependent on the facts of each particular case and, thus, must be determined by the lower courts on a case-by-case basis. *Lueck*, 471 U.S. at 220. A grant of *certiorari* is singularly inappropriate where the determination of the issue presented -- in this case, premption -- is dependent on the specific facts of the case.

C. There Is No Split Among The Lower Courts

The lower courts have uniformly applied *Lueck* when addressing § 301 preemption; there is no split among the courts regarding the legal standard to be applied. Most courts addressing the issue have concluded, with the court below, that defamation claims, under the facts presented in the particular case, were preempted. *See e.g., Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985); *Gregory v. Simon Brothers, Inc.*, 640 F. Supp. 1252 (N.D. Ind. 1986); *Green v. Hughes Aircraft Co.*, 630 F. Supp. 423 (S.D. Cal. 1985); *Gillis v. Reynolds Metals Co.*, No. CV-84-HM-5319-NW (N.D. Ala. Jan. 27, 1986) *aff'd without op.*, 802 F.2d 1398 (11th Cir. 1986) (*Gillis*

was a defamation suit, filed against Reynolds by another of the three arson suspects, based on the same factual allegations presented by Mays. Under identical facts, the federal district court, affirmed by the Eleventh Circuit, reached the same conclusion as the Alabama Supreme Court in the instant case and held that the claims were preempted.). However, the fact that a court may have reached an opposite conclusion, under the facts of its case, does not create a conflict. It is true, as Mays notes, that the Ninth Circuit has held -- under the facts presented to it -- that a defamation claim was not preempted. *Tellez v. Pacific Gas & Electric Co., Inc.*, 817 F.2d 536 (9th Cir.), *cert denied,* 108 S.Ct. 251 (1987). However, that decision was based on the facts of that case and was not a decision that defamation is never preempted. Thus, *Tellez* does not signal a split in the lower courts on the applicable law.

Mays has tried to create a "certworthy" issue by arguing that defamation is a "particularly abusive" tort that should not be preempted. However, Mays misses the mark. First, defamation is not necessarily "abusive" or malicious, as the facts in the instant case indicate. More importantly, abusiveness is well accommodated in the *Lueck* framework. Certainly the manner in which the tort is committed will bear on the question of whether the evaluation of that claim is "inextricably intertwined" with the rights and duties created by a collective bargaining agreement. However, the presence or absence of malice is simply one of the facts a court should consider in addressing the issue. A mere allegation of malice does not warrant modification of the analysis established in *Lueck*, and does not warrant a grant of *certiorari* in this case.

II. The Court Should Decline Review of the Waiver Issue.

Mays asks the Court to review the determination of the Alabama Supreme Court that Reynold's failure to raise § 301 preemption at the trial court level did not constitute a waiver of that argument. Petitioner seems to have included the issue as an afterthought, for he does little more than assert that the Court should grant *certiorari* because the Alabama Supreme Court resolved the issue incorrectly. Petitioner's posture is thus no different than that of every other party who has lost a case in a state supreme court or a federal circuit court -- he may feel he has a basis for arguing that the lower court erred, but that alone has never been an adequate basis for securing review by the Court.

A. § 301 Preemption Is Not Waivable

Plaintiff's sole contention in support of a grant of *certiorari* on the waiver issue is that the decision of the court below is not supported by this Court's decision in *Internat'l Longshoremen's Assn. v. Davis*, 476 U.S. 380 (1986). In *Davis* the Court concluded that *Garmon* preemption (*San Diego Trade Council v. Garmon*, 359 U.S. 236 (1959)) was in the nature of subject matter jurisdiction, which was not waivable, rather than in the nature of an affirmative defense, which could be waived under state rules of civil procedure. Contrary to Mays' assertion, the decision of the lower court here is consistent with *Davis* because § 301 preemption is in the nature of subject matter jurisdiction.

First, this Court has held that § 301 preemption is extraordinary, having far greater legal effect than an affirmative defense. *Caterpiller, Inc. v. Williams*, 482 U.S. ____, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). As

discussed in that case, a federal affirmative defense to state law claim will not supply subject matter jurisdiction to a federal court, and hence will not support removal of a case from state to federal court. However, § 301 preemption does invest a federal court with subject matter jurisdiction over a complaint asserting only state law claims, making such a case removable. Section 301 preemption operates to "convert[ ] an ordinary state law complaint into one stating a federal claim," and vests original subject matter jurisdiction in the federal courts, justifying removal. 96 L. Ed. 2d at 327. Hence, § 301 preemption is not merely an affirmative defense and is more in the nature of subject matter jurisdiction.

Second, under § 301, arbitration is the primary, preferred and almost universally required forum for the resolution of disputes relating to a collectively bargained employment relationship. With rare exception, a court (state or federal) must defer to the jurisdiction of an arbitrator. See, *Lueck*, 471 U.S. at 219. (And must accord extraordinary deference if called upon to review the decision of an arbitrator *United Paperworkers v. Misco*, ___ U.S. ___, 108 S. Ct. 364, 56 USLW 4011, 4013-14 (December 1, 1987)). Again, § 301 preemption is more in the nature of subject matter jurisdiction than of an affirmative defense.[1]

---

[1]Although not cited by Mays, the court in *Johnson v. Armored Transport of California, Inc.*, 813 F.2d 1041 (9th Cir. 1987), reached a different conclusion. However, neither of the above arguments was considered in that case. Furthermore, the plaintiff in *Johnson*, unlike Mays, did not file an arbitration along with his lawsuit and, again unlike Mays, did not win reinstatement, full back pay and seniority rights in arbitration.

B. Review of the Waiver Issue Is Not Warranted

Assuming, *arguendo*, that the court below erred, a grant of *certiorari* would nonetheless be improvident for the following reasons:

First, the case involves only the decision of a state court to waive its local procedural rules in deference to federal labor law; hardly a substantial federal question. Additionally, since the issue has rarely arisen, it does not appear to be a matter of national importance or concern.

Second, because the issue has seldom been addressed, the lower courts have not had occasion to develop a body of law for the Court to consider. That is, the issues have not percolated through the lower courts to be sharpened or defined, and competing considerations have not been weighed or analyzed.

Third, the decision of the Alabama Supreme Court is consistent with federal labor policies favoring uniform application of labor law and resort to the grievance and arbitration machinery as the primary and preferred forum for disputes arising out of the employment relationship. In *Lueck*, which was decided during the trial of the instant case, the Court decided that § 301 preemption could encompass state law tort claims. In reaching that conclusion, the Court noted the "central role of arbitration" and that the "need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in Lucas Flour. [*Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)]" 471 U.S. at 219. Indeed, Mays' rights were vindicated pursuant to an arbitration award reinstating Mays with full back pay and

seniority rights. There is no federal policy favoring "double-dipping."

Finally, state courts are not a final, or even a persuasive, source of federal law. Should the issue arise in the future with sufficient frequency to justify review by the Court, the Court will have a more appropriate opportunity to consider the matter at that time -- when the lower federal courts have analyzed the matter sufficiently to provide a solid foundation for review by this Court. At present, there is no sufficiently important basis to warrant review.

CONCLUSION

Based on the foregoing, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that I have caused to be served three copies of this Brief in Opposition upon Robert W. Walker, Walker & Musgrove Attorneys, 226 West Alabama Street, Florence, Alabama 35630 by causing same to be sent by United States mail, postage prepaid and properly addressed, on this the 25th day of March, 1988.

/s/ John H. Morrow
John H. Morrow
One of the Attorneys for
Reynolds Metals Company,
a corporation

Supreme Court, U.S.
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NO. 87-1189

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DOYLE A. MAYS,

Petitioner,

VS.

REYNOLDS METALS COMPANY,
A CORPORATION

Respondent.

REPLY BRIEF OF PETITIONER

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ARGUMENT

Of the cases cited by Respondent as authority for denying review of the pre-emption issue, other than those cases previously cited by petitioner, the only case decided by a federal circuit court of appeals in which an opinion was published is the case of Strachan v. Union Oil Company, 768 F. 2d 703 (5th Circuit 1985). The Strachan case is actually authority for holding that Mays v. Reynolds is not subject to pre-emption under §301. In Strachan there was no publication of words of defamation to anyone outside the company sphere, contrary to the facts in the present case. Strachan points out:

> Even defamation claims under state law have been preempted by a grievance-arbritration procedure unless malice is shown. Linn v. United Plant Guard Workers, 383 U. S. 553, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966). There is no malice shown in this record.

The Mays case is replete with malice.

In argument the respondent claims that, "a mere allegation of malice does not warrant modification of the analysis established in Lueck and does not warrant a grant of certiorari in the present case." Mays does not simply allege malice. Malice was alleged in the original complaint filed against Reynolds and was established by jury verdict under instructions from the trial judge in line with the standards set out by this Court in Linn v. United Plant Guard Workers, Supra.

In its argument with respect to whether the Court should review the waiver issue or not, Reynolds alleges that 301 pre-emption is in the nature of subject matter jurisdiction but cites no authority. Of course there are matters in which even the state courts of

general jurisdiction do not have subject matter jurisdiction. Examples of such lack of subject matter jurisdiction are bankruptcy proceedings and NLRB proceedings. In instances where courts of general jurisdiction lack subject matter jurisdiction to adjudicate a certain class of cases, there are other courts, boards or judicial officers of some type with exclusive authority to hear issues arising out of such matters. Subject matter jurisdiction deals with the court's competence to hear a particular catagory of cases. Standard Oil Company v. Montecatini Edison, 342 F. Supp. 125, 129. Mays v. Reynolds was tried in the Circuit Court of Colbert County, Alabama, an Alabama Court of general jurisdiction, whose powers are derived from Article VII, of Alabama Constitution of 1901, as amended by Amendment Number 328.

It has been held that Congress did not intend that §301 was to displace state court jurisdiction; rather the intent was to expand jurisdiction to include federal courts Masonite Corp. v. International Woodworkers of America, 115 So. 2d 691, Cert. denied 89 S. Ct. 1466, 394 U. S. 974, 22 L. Ed. 2d 753 (1968). Section 301 cases can be tried in either state courts or federal district courts. Neither federal district courts nor state courts have subject matter jurisdiction over labor disputes in which the authority to adjudicate has been vested in the National Labor Relations Board.

The Alabama Circuit Court had subject matter jurisdiction to try defamation cases and to try §301 cases. That being the case the Alabama law with respect to affirmative defenses is set

out accurately in the cases of Powell v. Phenix Federal Savings and Loan Ass'n, 434 So. 2d 247 (ALA. 1983) and in International Longshoremen's Ass'n v. Davis, 470 So. 2d 1215 (ALA 1985). The defense of 301 pre-emption is waived if not raised at the pre-trial level.

The Respondent argues that the issue of waiver has seldom been addressed. Within the past two years, in the context of labor law, a waiver issue has been involved in the case cited by Respondent of Johnson v. Armored Transport of California, Inc. 813 F. 2d 1041 (9th Circuit 1987), and in International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U. S. ____, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986), and in the case at bar. There could be, and probably are, a number of other such cases.

In a separate opinion which concurred in part with the majority opinion, it was pointed out in International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S.____, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986):

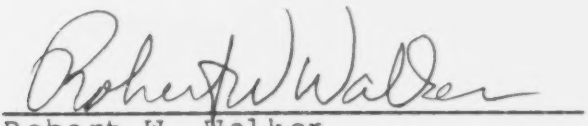
> By allowing a defendant to save its pre-emption claim until after it sees the verdict, this ruling poses a sufficient threat to orderly judicial proceedings that it can be justified only if Congress has mandated such a result. Because Congress clearly has not mandated such a result...

Respondent argues that petitioner included the waiver issue as an after thought, when Reynolds Metals did not even claim pre-emption until the matter was in the Alabama Supreme Court.

CONCLUSION

Petitioner submits that there are real and substantial issues and that the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,



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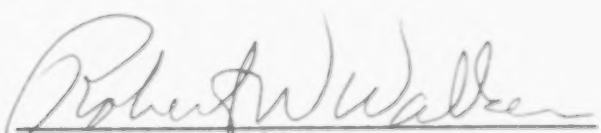
CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that three copies of this reply brief of petitioner were served this 4th day of APRIL, 1988, by placing them in the United States mail, first class postage prepaid, addressed to Respondent's counsel of record, Braxton W. Ashe and J. Michael Tanner, c/o Almon, McAlister, Ashe, Baccus & Tanner, P. O. Box 899, Tuscumbia, Alabama 35674 and to John H. Morrow and Walter J. Sears, III, c/o Bradley, Arant, Rose and White, 1400 Park Place Tower, Birmingham, Alabama 35203, in accordance with Rule 28 of the rules of this Court.



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